

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION**

IN THE MATTER OF:

New Bern Riverfront Development, LLC,

Debtor

**Case No. 09-10340-8-JRL
Chapter 11**

Motion For Order (i) Approving The Assumption Of Sale Contracts, (ii) Authorizing The Debtor To Convey Sale Properties And Pay Closing Costs (Including Commissions) From Sale Proceeds, And (iii) Transferring All Liens To Proceeds

New Bern Riverfront Development, LLC (the “Debtor”) moves the Court pursuant to Sections 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 6004 and 6006 for an Order (i) approving the assumption of certain sale contracts. (ii) authorizing the Debtor to convey certain properties and pay certain closing costs, including broker’s commissions, from the sale proceeds, and (iii) transferring all actual or potential liens to the proceeds of such sales, as follows:

1. On November 30, 2009 (the “Petition Date”), the Debtor filed a voluntary petition seeking relief under Chapter 11 of the Bankruptcy Code, and operates as a debtor-in-possession.

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the matter is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

3. The Debtor is the developer of SkySail Condominium, consisting of 121 residential condominiums (plus 1 commercial/non-residential unit) located on Middle Street on the waterfront in historic downtown New Bern, North Carolina (“Riverfront Project”), and sells the SkySail Condominiums (collectively, the “Sale Properties”) in the ordinary course of business. As of the Petition Date, 42 condominiums have been sold, 56 condominiums are under contract, and unsold condominiums are occasionally rented on a short-term basis by the Debtor.

4. In conjunction with the acquisition and development of the Sale Properties, the Debtor arranged financing with Wachovia Bank, National Association (the “Wachovia”) who holds a deed of trust to secure the funds advanced to complete the improvements. Upon

information and belief, Wachovia is owed approximately \$21,015,209 secured by first mortgage liens on the Sale Properties which have an aggregate value of approximately \$31,500,000.

5. The Debtor contracted with Weaver Cooke Construction, LLC (“Weaver Cooke”) to act as the general contractor on the Riverfront Project pursuant to a construction contract between the parties dated July 27, 2006 (“Construction Contract”). Prior to the Petition Date, the Debtor instituted litigation in the Superior Court Division, Wake County, North Carolina (“State Court Litigation”) against Weaver Cooke, certain subcontractors hired by Weaver Cooke, and Travelers Casualty Surety Company of America (“Travelers”), the company that is the surety under certain payment and performance bonds provided to the Debtor by Weaver Cooke pursuant to the Construction Contract. In the State Court Litigation, the Debtor, among other things, is seeking to recover judgment against Weaver Cooke and Travelers, jointly and severally, for damages arising out of Weaver Cooke’s breach of contract.

6. Weaver Cooke has filed a claim of lien in the amount of \$2,344,072 against the Sale Properties pursuant to Chapter 44A of the North Carolina General Statutes which the Debtor disputes. The Weaver Cooke lien is junior to the lien of Wachovia. In the State Court Litigation, the Debtor is seeking to have the liens filed against the Sale Properties discharged and declared void.

7. There also are other lien claims filed against the Sale Properties by subcontractors (the “Lien Claimants”) who supplied materials and/or labor for the purpose of constructing the improvements located on and thus an affixed part of the Sale Properties. Upon information and belief, the inchoate lien rights of the Lien Claimants are disputed, unliquidated, of unknown and uncertain priority, and junior to the liens of Wachovia.

8. The Debtor reserves for itself, any Committee of Unsecured Creditors subsequently created, and any trustee subsequently appointed, any and all rights to challenge, avoid, object to, set aside or subordinate any claims, liens, security interests or rights of setoff against the Sale Properties.

Pending Sales

9. In the ordinary course of business prior to the Petition Date, the Debtor entered into contracts (the “Sale Contracts”) with certain parties (the “Purchasers”), pursuant to which the Debtor agreed to sell to the Purchasers certain of the Sale Properties. The pending Sale Contracts are summarized on the attached **Exhibit A**.

10. Pursuant to the Sale Contracts and in the ordinary course of business, pre-petition, the Debtor at closing would (i) deliver a warranty deed, (ii) deliver a lien affidavit for purposes of enabling the Purchaser to obtain title insurance executed by the Debtor and all suppliers and contractors who might be able to assert a lien on the subject property, (iii) arrange for a release deed from Wachovia, (iv) pay ordinary and customary closing costs and, where applicable, a broker's commission, and (v) pay all or some agreed portion of the remaining sale proceeds to Wachovia.

11. Due to delays in completing construction of the condominiums and the lien claims being litigated in the State Court Litigation, many of the purchasers pursuant to the pending sale contracts have attempted to rescind or otherwise terminate the contracts, and some of the purchasers have demanded and pursued arbitration of such disputes. Other purchasers remain ready, willing and able to close the sales pursuant to their respective contracts.

Assumption of the Sale Contracts

12. Sections 365(a) and 1107 of the Bankruptcy Code authorize a debtor-in-possession to assume or reject any executory contract or unexpired lease, subject to bankruptcy court approval. Although § 365(a) does not provide a standard for determining when assumption or rejection is appropriate, bankruptcy courts have traditionally applied the "business judgment" standard in determining whether to permit the assumption or rejection of an executory contract or unexpired lease. See N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 523 (the business judgment test is the standard test traditionally applied by bankruptcy courts to authorize assumption or rejection of executory contracts); Control Data Corp. v. Zelman (In re Minges), 602 F.2d 38, 42-43 (2d Cir. 1979) (it is well settled that the bankruptcy court's determination concerning the assumption or rejection of an executory contract should be based upon the debtor's sound business judgment).

13. The decision to assume or reject a lease or executory contract is to be accepted unless it is shown that the debtor's decision was one taken in bad faith or in gross abuse of the debtor's retained business discretion. Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043 (4th Cir. 1985); Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095 (2nd Cir. 1993); In re Hardie, 100 B.R. 284 (Bankr. E.D.N.C. 1989).

14. In the present case, each of the Sale Contracts was negotiated in good faith and at arm's-length, entered into pre-petition, and reflects a sale of the subject property for full, fair and

adequate consideration. Assumption of the Sale Contracts is well within the Debtor's sound business judgment and in the best interest of the estate.

Sale of Properties

15. Section 363 of the Bankruptcy Code provides that a debtor may use, sell or lease property of the estate, both in the ordinary course of business and, after notice and hearing, other than in the ordinary course of business.

16. As with assumption or rejection of executory contracts, a sale of assets should be authorized if a sound business reason exists for doing so. See Comm. of Equity Sec. Holders v. Lionel Corp. (*In re Lionel Corp.*). 722 F.2d 1063, 1070 (2d Cir. 1983); WBQ P'ship v. Virginia Dept. of Medical Assistance Servs. (*In re WBO P'ship*). 189 B.R. 97, 102 (Bankr. E.D. Va. 1995); In re Delaware & Hudson Railway Co., 124 BR. 169, 175-76 (D. Del. 1991).

17. Once a debtor articulates a valid business justification, the business judgment rule is a presumption that the debtor acted in good faith and in the honest belief that the action was in the best interest of the company. Official Comm. of Subordinated Bondholders v. Integrated Resources, Inc. (*In re Integrated Resources, Inc.*). 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom. 488 A.2d 858, 872 (Del. 1985)).

18. Thus, if a debtor's actions satisfy the business judgment rule, then the transaction in question should be approved under §363(b)(1) of the Bankruptcy Code. See Pitt v. First Wellington Canyon Assocs. (*In re First Wellington Canyon Assocs.*). 1989 WL 106838, at *3 (N.D. Ill. 1989) ("Under this test, the debtor's business judgment . . . must be accorded deference unless shown that the bankrupt's decision was taken in bad faith or in gross abuse of the bankrupt's retained discretion.").

19. The proposed sales are pursuant to contracts entered into at arm's length, for fair and adequate consideration, and in the ordinary course of the Debtor's business. As such, the proposed sales are well within the Debtor's sound business judgment and should be approved.

Transfer of Liens

20. The Debtor further submits that it is appropriate to sell the Sale Properties free and clear of liens pursuant to § 363(f) of the Bankruptcy Code, with any such liens attaching to the sale proceeds to the extent applicable. Section 363(f) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of liens, claims, interests and encumbrances if:

- a. applicable non-bankruptcy law permits sale of such property free and clear of such interests;
- b. such entity consents;
- c. such interest is a lien and the price at which such property is to be sold is greater than the value of all liens on such property;
- d. such interest is in bona fide dispute; or
- e. such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

21. This provision is supplemented by § 105(a) of the Bankruptcy Code, which provides that “[t]he Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].”

22. Because § 363(f) of the Bankruptcy Code is drafted in the disjunctive, only one of the five conditions needs to be satisfied in order to be able to sell property free and clear of liens and interests. In re Takeout Taxi Holdings, Inc., 307 B.R. 525, 529 (Bankr. E.D. Va. 2004).

23. Upon information and belief, each of the Sale Properties are subject to liens in favor of Wachovia securing an indebtedness which in the aggregate is greater than the value of the individual property, such that no junior liens would be deemed “secured” within the meaning of § 506(d) of the Bankruptcy Code, and Wachovia does not object to the proposed sales.

24. The actual or potential liens of Weaver Cooke and the other Lien Claimants are disputed, unliquidated, unknown in amount and relative priority, junior to the liens of Wachovia, and may be transferred to proceeds as interests in bona fide dispute.

25. The transfer of all such liens to proceeds will enable the Debtor to convey clear title and preserve the value of the Sale Properties for the benefit of the Debtor’s estate. No creditors are harmed by the transfer of their respective claims, liens or interests to the proceeds of sale.

Protections of Section 363(m); Rule 6004(h)

26. Section 363(m) of the Bankruptcy Code protects a good-faith purchaser’s interest in property purchased from a debtor notwithstanding that the sale conducted under § 363(b) is later reversed or modified on appeal.

27. Rule 6004(h) provides that an order approving the sale of property is stayed until the expiration of 10 days after entry, unless the court orders otherwise.

28. Absent the relief requested herein, the Debtor cannot close these pending transactions as the sale proceeds from individual units will be insufficient to pay all liens in full, Wachovia may properly demand the receipt of all sale proceeds as a condition of granting a release of the specific property, and the Debtor will be unable to obtain lien waivers from all parties holding or able to assert liens against the subject properties.

29. Failure to timely close the pending transactions will result in irreparable loss, cost and damage to the Debtor's estates and the creditors in these proceedings. as Purchasers will likely look elsewhere to purchase a home and assert additional claims against the Debtor arising from the breach of the Sale Contracts. the Sale Properties will have to be re-sold and may generate lesser sale prices, and extra costs of delay and attorneys' fees will burden the estates with no corresponding benefit.

30. Conversely, assumption of the Sale Contracts will enable the Debtor to carry on their business in the ordinary course, preserve the value of the Sale Properties for the Debtor's estates and their creditors, and promote the opportunity for a successful reorganization.

31. In order for the Purchasers to close on their respective transactions, they must close on loans obtained from third-party lenders who in turn must be assured, through the orders of this Court and the title insurance obtained at closing, that the transfer of title to the Purchaser is final in all respects. Such assurance is well within the powers of this Court and appropriate for the transactions involved.

Wherefore, the Debtor prays the Court for the entry of an Order providing the following relief:

1. Authorize the Debtor to assume the Sale Contracts and find that each Purchaser is a "good faith purchaser" entitled to the protections of § 365(m).

2. Authorize the Debtor to sell, transfer and convey the Sale Properties in accordance with the terms and conditions of the Sale Contracts, and to pay at closing ordinary and customary closing costs, seller concessions and, where applicable, a broker's commission.

3. Transfer all liens, claims or interests of any creditor or other party in interest to the sale proceeds.

4. Provide that such Order shall be effectively immediately, as permitted by Rule 6004(h).

5. Such other relief as the Court may deem necessary and proper.

Respectfully submitted on behalf of the Debtor, this the 7th day of December, 2009.

/s/ John A. Northen

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Description	Name	Sale Price
unit 101	Barbara Jo Call & Claire Fuller	\$597,306
unit 102	Ann Buivid & Martin Spratt	\$581,540
unit 103	Rosemarie Fiorito	\$356,300
unit 105	Susan Mullan	\$361,200
unit 116	Jeffrey B. Taylor & Melissa D. Ellis	\$265,000
unit 121	Daryl Burgess, Ward Sylvester, Talmage Burgess & William Hargett	\$496,300
unit 123	Douglas K. Moyers & Cheryl Moyers	\$418,372
unit 125	Justin R. Spratt & Martin Spratt	\$264,468
unit 127	Stephen M Drezen	\$421,102
unit 134	Matthew J Hertzberg	\$229,900
unit 135	Melvin L Toomey	\$233,902
unit 201	Douglas Shepherd & Lynn Shepherd	\$634,688
unit 203	Douglas Letts & Pamela Letts	\$352,355
unit 205	Anthony Low & Rosemary Low	\$366,360
unit 208	Thomas Eugene Curd & Susan Margaret Curd	\$329,647
unit 214	Richard J. Rodriguez	\$224,152
unit 216	Jack Passot & Kathy J Passot	\$243,652
unit 217	Theodore F Shults & Katharine F Shultz	\$724,762
unit 219	The Clifton M Stoneburner and Mary T. Stoneburner Revocable Trust dated May 30, 2002	\$346,650
unit 224	GTG Properties LLC	\$238,390
unit 225	James D. Schulteis & May S. Schulteis	\$275,125
unit 229	Jeffrey A. Passot	\$417,790
unit 230	HNM Coastal Properties LLC	\$282,652
unit 234	Michael J Rodell	\$242,265
unit 236	The Investment Club LLC	\$229,900
unit 304	Gregory V Miller & Paula J Miller	\$489,294
unit 305	Christopher S. Boyce	\$371,520
unit 306	Khaled Jreisat & Jacqueline Jreisat	\$332,280
unit 307	Micheal P Campbell & Catherine M Campbell	\$468,585
unit 308	Taisha Clarke	\$326,600
unit 310	Julian Romero	\$299,900
unit 316	Steven A. Sanders	\$263,152
unit 317	Thomas H. Luter & Beverly G. Luter	\$678,377
unit 319	Jay P. Cherry & Ann B. Cherry	\$327,132
unit 321	Janet E. Crane, Trustee under Revocable Trust Agreement dated October 25, 2004	\$510,480
unit 324	GTG Properties LLC	\$246,080
unit 325	Edward B. Ellis Jr. & Veronica Ellis	\$272,025
unit 329	John A. Razzano & Patricia Razzano	\$423,675
unit 330	Stanly Hall LLC	\$287,527
unit 401	Dwayne Duckett & Claire Duckett	\$652,567
unit 403	Frank Tantum & Nasser Diab	\$371,570
unit 404	David Naugler & Elaine C. Naugler	\$508,810
unit 405	Mark Halpin & Ninette Halpin	\$376,680
unit 406	Mark A. Wilson & Stephanie Wilson	\$328,472
unit 407	DAKZ, LLC, a NC limited Liability Company	\$487,275
unit 412	Jonathan Kramer & Laurie Kramer	\$294,555
unit 414	Kenneth W. Fowler & Susan E. Fowler	\$250,477

Description	Name	Sale Price
unit 417	Erline Rita Gage Johnson & Graham Johnson, Trustees of the Erline Rita Gage UA dated July 30, 2003Johnson Revocable Trust	\$687,799
unit 421	The Sturman Family Turst dated Feb 4 2004, John P. Sturman and Hanna, Trustors and or Trustees	\$517,570
unit 427	Elaine Zimmerman	\$450,410
unit 428	Marcia Ibrahim & Michael Ibrahim	\$279,180
unit 430	Gregory E. Irvin & Beatrice L. DeMitte	\$299,900
unit 431	John K. Kryvorula	\$435,591
unit 432	William G. Price & Janet F. Price	\$256,500
unit 433	Richard Burrows	\$298,500
unit 435	Jonathan Kramer & Laurie Kramer	\$292,759
Total		\$21,219,020

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

IN THE MATTER OF:

New Bern Riverfront Development, LLC,

Debtor

**Case No. 09-10340-8-JRL
Chapter 11**

**Notice of Motion For Order (i) Approving The Assumption Of Sale Contracts, (ii)
Authorizing The Debtors To Convey Sale Properties And Pay Closing Costs (Including
Commissions) From Sale Proceeds, And (iii) Transferring All Liens To Proceeds**

The Debtor filed a motion with the Court requesting an Order, effective upon entry, (i) approving the assumption of certain sale contracts, (ii) authorizing the Debtor to convey certain properties and pay certain closing costs, including broker's commissions, from the sale proceeds, and (iii) transferring all actual or potential liens to the proceeds of such sales.

Notice is hereby given that the Motion may be allowed provided no response and request for a hearing is made by the parties in interest in writing to the Clerk of this Court within 21 days after the date of this notice. If no request for a hearing is timely filed, the Court may rule on the Motion thereto ex parte without further notice.

Respectfully submitted on behalf of the Debtor, this the 7th day of December, 2009.

/s/ John A. Northen

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

IN THE MATTER OF:

New Bern River Development, LLC
Debtor

Case No. 09-10340-8-JRL

Chapter 11

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing document by
1) Electronic service:

Marjorie K. Lynch Bankruptcy Administrator 434 Fayetteville Street Mall, Suite 620 Raleigh, NC 27601	Brian Darer Parker Poc Obo Wachovia P O Box 389 Raleigh, NC 27602-0389
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C. Hamilton Jarrett Obo Weaver Cooke Construction, LLC P O Box 30933 Raleigh, NC 27622	

2. and by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail at Chapel Hill, North Carolina, addressed to the following parties at their last known address as show on the attached exhibit.

This the 7th day of December, 2009.

/s/ John A. Northen

Counsel for the Debtor
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